

BRB Nos. 09-0415 BLA and
09-0415 BLA-A

PATRICIA CONN)
(Widow of BURL CONN))
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 CROSSGATE MINING COMPANY,)
 INCORPORATED) DATE ISSUED: 02/25/2010
)
 and)
)
 KENTUCKY COAL PRODUCERS SELF-)
 INSURANCE FUND)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in the Survivor's Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

Ronald E. Gilberston (K & L Gates LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits in the Survivor's Claim (2008-BLA-5238) of Administrative Law Judge Larry S. Merck with respect to a claim filed on March 27, 2007, pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).¹ In his Decision and Order dated February 17, 2009, the administrative law judge credited the miner with fifteen years of coal mine employment, as stipulated by the parties, and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that while claimant established that the miner had simple pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

Claimant appeals and generally asserts that the evidence is sufficient to establish her entitlement to benefits. Employer responds, urging affirmance of the denial of benefits. In its cross-appeal, employer argues that the administrative law judge erred in redacting portions of Dr. Caffrey's opinion that were based on his review of the miner's medical records and the death certificate on the issue of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Director, Office of Workers' Compensation Programs, has not filed a response to either appeal.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant is the surviving spouse of the miner, Burl Conn, who died on November 10, 2006. Director's Exhibit 22.

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that the miner had fifteen years of coal mine employment, and that claimant established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, the miner's death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. *See* 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

In this case, the miner's death certificate, signed by Dr. Musgrave, listed the immediate cause of death as glioblastoma. Director's Exhibit 22. Dr. Dennis performed the miner's autopsy on November 22, 2006, and reported the presence of anthracosilicosis with progressive massive fibrosis (PMF) and "macular development of greater than [three centimeters] in diameter," along with moderate to severe bronchopneumonia.⁴ *Id.* Dr. Dennis opined that the miner "died a pulmonary death." *Id.* In a letter dated July 21, 2008, Dr. Dennis noted that PMF "acts in a fibrotic manner to cause decreased functioning [in] pulmonary alveolar spaces" and opined that PMF was "the base pathological process present . . . leading to [the miner's] complication of bronchial pneumonia and subsequent death." Claimant's Exhibit 1.

Dr. Caffrey reviewed the miner's autopsy slides and other evidence and prepared a report dated June 4, 2007. Director's Exhibit 33. Dr. Caffrey noted that he saw no evidence of PMF and disagreed with Dr. Dennis's gross description of coal macules exceeding three centimeters in diameter. Director's Exhibit 33. Dr. Caffrey opined that while the miner died from a pulmonary death, "the amount of coal dust in [the miner's] lungs was mild . . . with only a few lesions of simple [coal workers' pneumoconiosis], and the coal dust and paucity of lesions of simple [coal workers' pneumoconiosis] would not have caused, or in any way contributed or hastened [the miner's] death." *Id.*

Dr. Naeye reviewed the autopsy slides and reports of Drs. Dennis and Caffrey and prepared a consultative report dated June 26, 2007. Director's Exhibit 34. He opined

⁴ The administrative law judge acknowledged that the definition of clinical pneumoconiosis includes, but is not limited to, anthracosilicosis and massive pulmonary fibrosis. Decision and Order at 9, *citing* 20 C.F.R. §718.201.

that there was no evidence of either simple or complicated pneumoconiosis, and therefore, he did not address the issue of whether pneumoconiosis caused or hastened the miner's death. *Id.* Finally, Dr. Westerfield prepared a consultative report on January 30, 2008, based on his review of the reports of the other physicians of record. Employer's Exhibit 1. Dr. Westerfield opined that "the immediate cause of death appears to be a respiratory death - *pneumonia*, as is often the terminal event in cancer patients." *Id.* (emphasis in original). Dr. Westerfield opined that the development of pneumonia has no relationship to the inhalation of coal dust or the presence of simple pneumoconiosis. *Id.* He opined that the miner's "long history of cigarette smoking" and his "pathological evidence of emphysema" along with his cancer "may have created an impaired immune system" and "made it quite likely" that the miner would develop terminal pneumonia. *Id.*

The administrative law judge found the evidence to be equally balanced as to the presence of complicated pneumoconiosis, and thus he found that claimant was unable to establish that the miner's death was due to pneumoconiosis based on the presumption at 20 C.F.R. §718.304. Decision and Order at 17. The administrative law judge further found that the death certificate did not address the issue of whether the miner's death was due to simple pneumoconiosis, and that the only physician's opinion attributing the miner's death to pneumoconiosis was insufficiently reasoned and documented to support claimant's burden of proof. Decision and Order at 16; *see Clark*, 12 BLR at 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Specifically, the administrative law judge found that Dr. Dennis's opinion was entitled to little weight as he failed to explain the specific process by which pneumoconiosis or coal dust exposure contributed to the miner's death. *See Conley v. National Mines Corp.*, F.3d , 2010 WL 481292 (6th Cir. Feb. 12, 2010); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); Decision and Order at 18. Thus, the administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis under any of the methods set forth at 20 C.F.R. §718.205(c).

Claimant's sole contention in this appeal is that "the evidence in this case was sufficient for the [a]dministrative [l]aw [j]udge to make a finding of a causal connection between the miner's coal workers' pneumoconiosis and his death." Claimant's Brief at [2] (unpaginated). However, in order to invoke the Board's review power, claimant must raise specific errors with regard to the administrative law judge's credibility findings or the weight accorded the conflicting evidence. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Claimant's contention that the record contains sufficient information for "the Board to make a finding" that the miner's death was due to pneumoconiosis mistakes the role of the Board in this appeal. The administrative law judge, as the trier-of-fact, has discretion to make credibility findings and determine the weight to accord the evidence. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek*

Collieries v. Director, OWCP [Stephens], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Claimant's mere citation to medical evidence and lay testimony in support of her case amounts to no more than a request that the Board reweigh the evidence of record, which is beyond the Board's scope of review. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We therefore affirm the administrative law judge's finding that claimant failed to establish that miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and the denial of benefits.⁵ *Trumbo*, 17 BLR at 1-88-89 and n 4.

⁵ Because we affirm the administrative law judge's denial of benefits, it is not necessary that we address employer's argument on cross-appeal that the administrative law judge erred in limiting the scope of Dr. Caffrey's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order Denying Benefits in the Survivor's Claim of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge